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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 483

DR. HENRY M. LADREY, *Petitioner*,

v.

COMMISSION ON LICENSURE TO PRACTICE THE HEALING ART IN THE DISTRICT OF COLUMBIA, *Respondent*.

Petition for Rehearing on Petition for Writ of Certiorari

WILLIAM B. BRYANT
JOSEPH C. WADDY
WILLIAM C. GARDNER
Counsel for Petitioner
615 F Street, N.W.
Washington 4, D. C.

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Petition for Rehearing on Petition for Writ of Certiorari

To: The Honorable The Chief Justice of the United States and Honorable Associate Justices of the Supreme Court of the United States.

Comes now the petitioner and presents this petition for a rehearing on the petition for a Writ of Certiorari filed in this case.

JURISDICTION

The petition for certiorari was filed on October 29, 1958. On December 15, 1958, the Court entered the following order:

> "The petition for writ of certiorari in this case is denied. Mr. Justice Black and Mr. Justice Douglas are of the opinion that certiorari should be granted.

Mr. Justice Frankfurter took no part in the consideration or decision of this application."

This petition for rehearing is filed within 25 days from December 15, 1958 In accordance with Rule 58 of this Court.

REASONS FOR PETITION FOR REHEARING

Petitioner urges this Court to rehear his petition because the decision of the lower court marks the first step in the crystalization of confusion and uncertainty in the law in the District of Columbia with respect to Title 47, U.S.C. Section 605. This is aptly demonstrated by the lower court's decision, the respondents' answers to the wire tapping issue, and the recent decision in *United States* v. *Barbour*, 164 F. Supp. 893 (D. C. 1958). This latter case appears in the October 27, 1958 advance sheet of Federal Supplement, and was not familiar to the petitioner at the time his petition was filed on October 29, 1958. But it graphically illustrates the court's apparent uncertainty as to the import of *Rathbun*, when it states: ". . . Upon the basis of the cases of *Goldman* v. *United States*, supra, and *Rathbun* v. *United States*, supra, this Court denies the motion of the defendant to suppress as evidence the ten capsules, for the information obtained by the police in the manner previously stated did not constitute a violation of Title 47, U.S.C.A. Section 605," p. 897. In *Barbour*, a police officer had a special employee of the narcotics squad place a call to Ad 2-4559, and the former listened to the conversation between the special employee and one "Sonny," wherein arrangements were made for the purchase of narcotics. During the conversing, Sonny told the special employee that narcotics were presently on the premises, 62 P Street, N.W. Arrangements were made for the purchase of narcotics and after they were obtained the police officers secured a search warrant for the premises and found narcotics therein. The motion to suppress was predicated upon the violation of 47 U.S.C.A. Section 605.

The District Judge expresses his impression that there is "... a clear conflict as to what constitutes an unauthorized interception within the meaning of Section 605." *Barbour*, supra, 164 F. Supp. 893, 896, and indicates his uncertainty as to whether or not *Rathbun* resolves it by drawing on *Goldman*, supra, for additional support.

In the instant case *Rathbun* v. *U. S.*, 355, U.S. 107, was relied upon by the court below in disposing of this issue. Mr. Justice Frankfurter, speaking for the minority in that case, observed

> "The fact that the Court relies on 'the consent of one party' evidently implies that it would not be without the purview of Section 605 for a police officer to conceal himself in a room of a house or a suite of offices having several 'regularly used telephone extensions' and surreptitiously to utilize such an extention to overhear telephone conversations." 355 U.S. ——.

But respondent contends to the contrary that Mr. Justice Frankfurter's hypothetical police officer would be without the purview of Section 605 and that his testimony as to the telephone conversation would be admissible.

In its original brief respondent relied entirely upon the court's decision in *Rathbun* v. *U. S.*, supra. (Brief of respondent filed November, 1958, p. 12.) However, in its subsequent brief in opposition respondent compares the operative facts in *Rathbun* with those in this case, and candidly concedes that: "... in these respects this case differs from Rathbun"; but urges, however, that this court should not review the decision because it falls within the purview of an alleged well-settled principle that "the presence or absence of consent [is not] relevant to whether use of an extension telephone constitutes an interception"; for "the interception which is proscribed by Section 605 ... is an interference with the system of communication by interception in the process of transmission and not in listening on a regularly installed telephone instrument to a message which is being

transmitted without mechanical interception to the place to which it was directed" (Brief for Respondents, p. 14, Dec. 1958). Cited as authority for this view are *Goldman* v. *U. S.*, 316 U.S. 129, 133, 134; and several Circuit Court cases (Ibid. p. 14-15).

While respondent evidently is driven to this "mechanical" argument by the absence, as it concedes, of that element which the majority in *Rathbun* relied upon, viz. "the consent of one party," its position cannot be reconciled with the language or the rationale of *Rathbun*. For if this Court regarded such an interpretation of 47 U.S.C. Section 605 as the law, it is inconceivable that it would have ignored it as the basis of decision in *Rathbun*.

If this case involved the application of a little used or seldom applied principle of law it might fairly be said to have little to commend itself to this court's consideration for certiorari. But indications are that this is not so. Already a body of case law, of which this case is one example, has begun to develop in which *Rathbun* is cited as authority for the general proposition that evidence obtained by police officers by listening in on one of their extension telephones to conversations between persons under their control and a sender, without the latter's consent, is admissible against him, e.g. *Douglas* v. *United States*, 250 F. 2d 576 (4th Cir. 1957); *United States* v. *Barbour*, supra.

We feel that this court in *Rathbun* intended to establish no such precedent. As petitioner reads *Rathbun*, this court simply held that there was no interception under the peculiar circumstances present there.

We therefore urge this court to grant this petition and clarify the law in this area so that the lower courts may be guided in the resolution of future cases involving facts dissimilar to *Rathbun*. See *The Supreme Court, 1957 Term*, 72 HARV. L. Rev. 77, 150-52 (1958).

CONCLUSION

For the foregoing reasons, the petitioner respectfully urges that a rehearing be granted; that upon further consideration that the order of December 15, 1958, denying the petition for certiorari be revoked, and that the writ of certiorari issue.

WILLIAM B. BRYANT
JOSEPH C. WADDY
WILLIAM C. GARDNER
Counsel for Petitioner
615 F Street, N.W.
Washington 4, D. C.

I, William B. Bryant, counsel for the petitioner, Henry M. Ladrey, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for the purpose of delay and that this petition is restricted to the grounds urged. as provided under R. 58

WILLIAM B. BRYANT
Attorney for Petitioner

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